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No. 88-1896
IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1988

DORSEY DUNTON and DICK J. FLETCHER,
Petitioners,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 403, GALE WARD, and SIDNEY STOLPHER,
Respndents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Petitioners submit the facts when construed in favor of Petitioners as required in review of a judgment notwithstanding the verdict do not show interference with federal labor law and should not be the basis for pre-emption. This reply brief is also offered to address the following additional question presented: Assuming the facts support the jury's verdict for intentional infliction of emotional distress and there is no realistic threat of interference with the federal regulatory scheme, is a labor union vicariously liable for the abusive acts of its members, officers, business managers and/or employees?

I

THE FACTS OF THIS CASE FALL SQUARELY WITHIN THE RULE OF FARMER v. CARPENTERS REQUIRING REVERSAL OF THE COURT OF APPEALS' DECISION

In accordance with **Haughter v. Zogart** (1975) 14 Cal.3d 104, the review of this court must be based upon

the evidence most favorable to Petitioners, and all conflicting evidence must be disregarded. Since the Court of Appeal never addressed Petitioners' appeal of the order for new trial (App. 34), the findings of the trial court as well as any evidentiary weighing of conflicting evidence by the Court of Appeal is irrelevant for purposes of this review. Rather than accepting the evidence favorable to Petitioners as required in review of a denial of a motion for judgment notwithstanding the verdict, Respondents and the Court of Appeal have disregarded facts in favor of Petitioners and improperly reweighed evidence so as to characterize this case as an employment discrimination case.

In their brief in opposition, Respondents have chosen to ignore the jury verdict and the evidence in favor of Petitioners and have instead presented the facts of the case based on findings the trial court judge rendered in granting the motion for new trial which motion has never been reviewed. In their opposing brief, Respondents' inconsistent rendition of the "facts" include the following discrepancies:

1) While admitting petitioners have alleged "that Respondents had subjected Petitioners to physical threats and intimidation", Respondents state, "No public ridicule, abusive language or physical violence accompanied the alleged discrimination, and Petitioners have never claimed otherwise," (Opp. 3);

2) Respondents claim both the California trial court and Court of Appeal concluded Petitioners failed to prove allegations of physical threats and intimidation by Respondents. (opp. 2-3, fn. 1). Yet, Respondents simultaneously concede Petitioners' evidence of harassment and threats of violence at the workplace did implicate at least rank-and-file members of the union.[1] (Opp.3, fn. 1); and

3) Respondents further claim that the "California Court of Appeal unanimously agreed with the trial court's assessment of the evidence" while simultaneously stating " the Court of Appeal in its opinion after rehearing ... did not address the sufficiency of Petitioners' evidence under state law" (Opp. 3).

1. Actually, the Court of Appeal stated the acts of harassment were also attributable to a member of the executive board. (App.42)

The Court of Appeal obviously reweighed the evidence before the jury when it found evidence of various abusive acts "of no significance", "garden variety" discrimination, "not discriminating" and "not done abusively" (App. 41-43).

Although Petitioners presented evidence of physical threats by executive board members[2], the Court of Appeal determined that such acts of harassment were insignificant and did not "indicate any officers of the local union threatened or caused physical harm, subjected either Plaintiff to ridicule, used vile language, yelled, screamed or did anything physically or emotionally abusive." (App. 42) Although the trial court and the Court of Appeal may have weighed the evidence of threats and physical violence differently than the jury, Petitioners submit the trial court and Court of Appeal's findings as to sufficiency of the evidence are irrelevant in this appeal of the dismissal based on a judgment notwithstanding the verdict.

The evidence of abusiveness presented in this case is virtually indistinguishable from the abusive acts supporting a finding of no pre-emption set forth in **Farmer v. Carpenter**, 430 US 290 (1977). In **Farmer v. Carpenter**, a state court tort action for intentional infliction of emotional distress was held not pre-empted where the union member sued the union and its officials for abusive conduct consisting of the union's campaign against the employee in referrals for employment because of the employee's dissident intraunion political activities. In addition to those same facts, the instant case involves death threats and physical violence by rank-and-file members and members of the executive board.

2. "Q. Any other physical threats in the first week, that you recall? A. Yes. Q. Who made those? A. Mr. Dan Gaddis. Q. And Mr. Gaddis was a local 403 member? A. And I believe executive board member. Q. What did Mr. Gaddis tell you? A. He ran up to me in a dark portion of the levels of the building, and told me that he didn't like being sued, and I told him, 'Well, if you operated the local according to the rules you wouldn't get sued.' He said, 'I don't care. Cover your ass while you're here.' " (RT 140) "Q By Mr. Gallo: As a result of your conversation with Mr. Stein, Mr. Dunton, did you have further discussions with Mr. Ward? A. Yes, I did. Q. And did you request to be admitted to the union? A. Yes, I did. Q. When you first contacted Mr. Ward again, what was -- What were his statements to you? A. He told me that 95 percent of the members do not want you in this local or out on that job and you have to pay for what you did." (RT 111)

With respect to a claim of intentional infliction of emotional distress, the Court in **Farmer** held that in the context of the other allegations of discrimination in hiring hall referrals, although some allegations might form the basis for unfair labor practice charges with the NLRB, the claim was not pre-empted because the state had a substantial interest in regulation of the tortious conduct at issue, and the state's interest was one that did not threaten undue interference with federal regulatory statutes. As stated in **Farmer**, there is no provision of the NLRA that protects the outrageous conduct complained of, while the State has a substantial interest in **Farmer** found that even if charges in the complaint were filed with the NLRB, the focus of the unfair labor practice proceeding would be on the hiring hall discrimination, without any consideration of the emotional distress, for which the NLRB could not award damages.

The court in **Farmer** held where abusiveness such as that required to support a California cause of action for intentional infliction of emotional distress exists, there can be no finding of pre-emption absent a finding of interference with the federal regulatory labor law scheme. In order to find pre-emption in this case, the Court of Appeal must find the facts most favorably viewed for Petitioners: (1) do not support a state cause of action for intentional infliction of emotional distress; and (2) do not show interference with the federal regulatory scheme.

Whereas here the Court of Appeal specifically failed to consider whether the evidence supported a California caused of action for intentional infliction of emotional distress (App. 38) and also made no findings as to interference with the regulatory scheme, there are no grounds to support its ruling of pre-emption. Since there was no finding of interference with the federal labor law regulatory scheme, this case directly conflicts with the holding of **Farmer** and should be reversed.

II

A LABOR UNION IS VICARIOUSLY LIABLE FOR STATE TORT DAMAGES ARISING FROM THE ACTS OF ITS OFFICERS, BUSINESS MANAGERS, MEMBERS AND/OR EMPLOYEES

Respondents grossly misstate the Court of Appeal's opinion and the court record when they claim, "Instead, petitioners' evidence of harassment and threats of violence at the workplace implicated only rank-and-file members of the union, whose acts were not authorized or ratified by respondents. (Appl 42, 64-65)" (Opp. 3, fn.1). The record reflects Petitioners presented evidence of physical threats and intimidation by members of the union's executive board as well as the rank-and-file. (RT 111 140). The Court of Appeal also recognized the acts of harassment were "attributed to rank-and-file members of defendant local union and to one member of its executive board" (App. 42).

Respondents and the Court of Appeal summarily state that the union is not liable for the abusive acts presented in evidence at trial by Petitioners. Instead, without citing any statutory or case law, the Court of Appeal found that acts of harassment had to be "authorized or ratified by the local union, its governing board, or any of its officers or agents." (App. 42) Obviously a member of the union's executive board and the business manager qualify as officers or agents whose acts could be imputed to the union. A union may be held responsible for its officers' or members' acts under California law.

Petitioners submit that the vicarious liability of the union for the acts of its agents and members is a major issue in this case. When, as here, federal labor statutes do not apply in a California state court action, a union's liability is determined according to the established state rule that acts of union officers, agents, or employees within the scope of their office, agency, or employment bind the union. California case law states that a union is liable for its members' acts. **In J.R. Norton Co. v. General Teamsters, Warehousemen & Helpers Union, Local 890** (1989) 208 Cal.App.3d 430, 256 Cal.Rptr. 246, 254 the Court stated:

> A union's responsibility for the acts of its agents is well-established in California. A labor union is an unincorporated association. An unincorporated association is liable for its own torts as if the association were a natural person. An unincorporated association acts through its officers, agents, or employees. When they are acting within the scope of their office, agency, or employment, their actions bind the association. (Corp. Code, §24000 et seq.; **Marshall v. International Longshoremen's & Warehousemen's Union** (1962) 57 Cal.2d 781, 22 Cal.Rptr. 211, 371 P.2d 987; **Inglis v. Operating Engineers Local Union No. 12** (1962) 58 Cal.2d 269, 23 Cal.Rptr. 403, 373 P.2d 467; **Coats v. Construction & Gen. Laborers Local No. 185** (1971) 15 Cal.App.3d 908, 93 Cal.Rptr. 639.)

The **Norton** decision was followed in another case decided after Respondents' brief was filed, **Vargas v. Retail Clerk's Union Local 1528** (July 20, 1989) 212 Cal.App.3d 319, 260 Cal.Rptr. 650. The facts in **Vargas** are similar to those in the instant case. In **Vargas** a union business agent was the primary instigator of threats and intimidation directed to plaintiff employers, their employees and customers of plaintiffs' business during a strike. Threats and other acts were carried out by the business agent as well as rank-and-file union members and union employees hired as strikers. The union members' acts supported a jury verdict against the union for intentional infliction of emotional distress and intentional interference with business relations between the store and its customers. The union appealed, seeking a ruling that the state tort action was pre-empted by federal law did not pre-empt the state claim and usurp the state's police power, but also that the following instruction was proper:

> "If you find that union officials, agents, members and/or employees, both named and unnamed, planned and carried out any unlawful acts, then the union itself must be held accountable." **Vargas, supra**, 260 Cal.Rptr. at 663.

The Court cited **In re Coleman** (1974) 12 Cal.3d 568, 116 Cal.Rptr. 381, 529 P.2d 533, as establishing that a consistent pattern of violence and threats of violence can prove a concerted effort by a union which will support the union's tort liability for those acts. Under the language of both **Norton** and **Vargas**, it makes no difference whether rank-and-file members performed the acts of harassment or whether the harassment was performed by an executive board member. The important consideration is whether the acts were planned and carried out by union officials, agents, members or employees. In this case that is precisely what Petitioners' evidence showed at trial. Petitioners presented evidence of acts of harassment at all levels and thus fall squarely within the approved instruction in **Vargas** which represents the law of the state.

Recent California law clearly indicates the union is vicariously liable for abusive acts of its members and officials. It is submitted that the tortious acts of the union, business manager, executive board and members, as provided in this case, constitute acts of the union and are "abusive" under the standards set forth in the **Farmer** case, and therefore do not subject this case to pre-emption. To hold otherwise ignores the mandates of **Farmer** and deprives Petitioners of their rights under state law.

III

CONCLUSION

Petitioners submit that based upon the facts as supported by the evidence favorable to Plaintiff, this case falls squarely within the standard of **Farmer v. Carpenters** thereby requiring reversal of the Court of Appeal's opinion.

Dated: September 24, 1989

Respectfully submitted,

GEORGE GALLO
COLLINS, SULLIVAN &
TOEWS

By: _____
Shaunna Sullivan
Attorney for Petitioners

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 9016 Mission Boulevard, Riverside, California 92509.

On September 24, 1989, I served the within PETITIONERS' REPLY MEMORANDUM on the interested parties in said action, by placing a true copy in each of four (4) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

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I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on September 24, 1989, at Riverside, California.

JACK GALLAGHER